



# Government, Preservation, and Property

**Indiana Close Up  
A Jefferson Meeting  
on the Indiana Constitution**



Issue Book Number 3



## Thank you

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Additional thanks are due the following individuals, organizations, and parts of state government for their help:

Office of the Attorney General  
Indiana Council for the Social Studies  
Indiana Department of Administration  
Indiana Department of Education  
Indiana House of Representatives  
Indiana Senate  
Indiana Supreme Court

with funding from the Close Up Foundation and the Indiana Humanities Council in cooperation with the National Endowment for the Humanities.

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**The Jefferson Meeting format requires analysis, critical thinking, public speaking, and cooperative work by participants no matter their level of ability. The Meeting links the Constitution with issues currently in the spotlight and has been called a history lesson with a focus on the present and a civics lesson with historical perspective.**

**The Jefferson Foundation is located at 1529 18th Street, N.W., Washington, D.C. 20036; telephone 202-234-3688.**

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## Availability

Copies of this publication are available from the Indiana Historical Bureau, 140 North Senate Avenue, Room 408, Indianapolis, Indiana 46204-2296. Call for details: 317-232-2535/TDD 317-232-7763/FAX 317-232-3728.

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## Disclaimer

This issue essay should be used as an educational aid to encourage discussion and study. It is not a complete revelation of the current law. The legal issues referred to are far more complex than we are able to address in this format.

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Government's obligation to preserve the environment outweighs an individual's right to unrestricted use of property.

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## The Issue

- Constitution of Indiana

Article I, Section 1. - WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; . . . that all power is inherent in the people; and that all free governments are . . . instituted for their peace, safety, and well-being. . . . (Amended November 6, 1984)

Section 21. - . . . No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered. (Amended November 6, 1984)

- United States Constitution

Fifth Amendment. . . nor shall any person be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, Section 8. - The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . [and] To regulate commerce with foreign nations, and among the several states . . . .

## Relevant Constitutional References

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The U.S. Constitution was ratified in 1787. The first ten amendments, called the Bill of Rights, were ratified in 1791. Most of the original thirteen colonies had bills of rights with their constitutions when they formed the Union. Each new state which entered the Union had a constitution. Indiana's original 1816 constitution included a Bill of Rights of 24 sections in Article I. The 1851 Indiana constitution contains 37 sections in Article I, known as the Bill of Rights, and gives more rights to citizens than the federal Bill of Rights.

The rights enshrined in the U.S. Bill of Rights are considered so fundamental, nearly sacred, that they were spelled out as protections to citizens from encroachment by the federal government. State constitutions likewise protected the rights of citizens from encroachment by state government.

The rights enumerated in the U.S. Bill of Rights are connected by the thread of "natural rights" to Roman times. The concept of "natural rights" assumes that all humans are born with certain rights that cannot be transferred or taken away.

Some of these rights are specified in the Magna Carta in 1215 A.D., the English Bill of Rights in 1689, and the United States Declaration of Independence, Constitution, and Bill of Rights.

## Historical Context

Private ownership of property was considered one of the fundamental rights of a democratic government by our founders and early philosophers. Early in U.S. history, only property owners—mostly white males—could vote. Collectively, individual property owners, by their votes, served as an important check on the federal government. The rights of property owners to unrestricted use of their own properties—although not a reality—has been and is a powerful symbol of individual freedom.

While the founding fathers recognized the importance of private property, they also firmly established, in the Fifth Amendment, the right of eminent domain. Eminent domain gives government the right to take an individual's property for public use without the owner's consent as long as just compensation occurs.

Today, the interpretation of "taking" an individual's property has been broadened. Courts have heard arguments calling for compensation to owners whose use of property has been regulated to the point that it has no economic value. In Indiana, the right of eminent domain has been available at both state and local levels since 1816.

In 1919, when the Indiana Department of Conservation was established, its role was to manage Indiana's parks and fish, wildlife, timber, and other natural resources. In 1965, the Department of Conservation was abolished, and the Indiana Department of Natural Resources was established. Its purpose, as stated in a 1972 report, was to conserve Indiana's natural resources as "basic, both now and in the future, to the welfare of all Indiana citizens" (Durfee, *Indiana Department of Natural Resources*, 1972, p. 1).

In 1972, the Indiana General Assembly, recognizing the increasing complexity of environmental management, created a six-member Environmental Management Board. Review of the state's environmental policies and programs in 1983 led to the establishment of a new state agency dedicated exclusively to environmental issues—the Indiana Department of Environmental Management.

Regulations established by both the Indiana Department of Natural Resources and Indiana Department of Environmental Management, as well as those of other federal, state, and local governmental units, have caused heated discussions in public forums and in the courts. At issue is government's interest in the welfare of all versus property owners' rights to benefit from the use of their property.

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## The Arguments Pro and Con

### Some Pro Positions

**Yes, government's obligation to preserve the environment outweighs an individual's right to unrestricted use of property.**

1. Government must act to preserve limited resources for future generations.

What do siltstone glades, salamanders and shale from the Mississippian age have in common with blind fish, limestone bluffs and fossil beds? All are in some nature preserve area in Indiana, whether in the state park system, in a federally protected area, or on land purchased by private environmental funds. These preserves have all been acquired to protect the dwindling amount of natural vegetation,

land formations, or endangered species. Estimates in 1993 are that Indiana has only  $\frac{1}{10}$  of 1% of its entire land left in its natural condition and that Indiana's park system comprises  $\frac{2}{10}$  of 1% of the state's acreage. For a state of over 36,000 square miles, this is a very small portion of land in its natural state.

The government must act to preserve the land, the resources, the plant and animal life that remain relatively untouched. Future generations will be dependent on the earth we choose today. The local, state, and federal governments, along with all individual citizens, have a responsibility to that future. We must protect the ecosystem now so that future generations have a habitable world to inherit—a world with natural resources, plants and animal life. Speaking on the environment, and quoted in the *Nature Conservancy Newsletter* in 1988, President Lyndon Johnson said:

If future generations are to remember us more with gratitude than sorrow, we must achieve more than just the miracles of technology. We must also leave them a glimpse of the world as it was created, not just as it looked when we got through with it.

2. It is a legitimate interest of government to regulate the use of private property in favor of the general welfare.

Based upon the powers in Article I, Section 8 of the U. S. Constitution (see page 3) the Congress has enacted the various endangered species acts and conservation and preservation laws. It is upon this same premise that states base their powers.

At both the federal and state levels, we recognize private property rights, yet establish the precedent of public use with adequate compensation, known as the principle of eminent domain.

The government, whether state or federal, has broad-based power which can be used to deal with the diverse issues of citizen rights, commerce, and conservation and preservation. Thus, governments can limit resource use to ensure future generations will have access to those resources. Governments often work cooperatively with private environmental groups or various state and federal agencies in handling these conservation issues. Some agencies involved in such efforts include the Environmental Protection Agency, the U. S. Department of the Interior with its Division of Nature Preserves and the Division of Fish and Wildlife, the Bureau of Land Management, Department of Environmental Management, and the U. S. Army Corps of Engineers. Private agencies include such groups as the Sierra Club, National Audubon Society, the Hoosier Environmental Council, the Nature Conservancy, Friends of Animals, Greenpeace, and others.

With these multi-layers of federal and state efforts, as well as the work of the private interest groups, much room for confusion and duplication of efforts exists. But much work in environmental protection is also being done.

## Some Con Positions

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**No, government's obligation to preserve the environment does not outweigh an individual's right to unrestricted use of property.**

1. Government regulations infringe upon individual property rights.

Private property should be kept private. The government should stay out of this area. If a property owner wishes to use or sell his property, as long as it is done legally, the government should not be involved. Natural minerals, land formations, plants and animals on the land should all reside with the ownership rights of the individual. How can the government or an environmental group tell property owners that they cannot use the property as they wish? Wetlands, plant and animal life, land formations have all been protected in the name of preservation. Yet what of the rights of the individual? What of the guarantees of the U.S. Constitution and of the 1851 Indiana Constitution noted on page 3? Is this state intervention in conflict with the individual pursuit of happiness?

2. Government regulations on use of private property impede economic growth.

Economic growth also depends on the use of private property. If a property owner wishes to use property to produce economic growth, the nation will prosper. This economic growth will help all citizens, and our gross national product will increase. Why should a spotted owl be allowed to impede the lumber industry or limestone formations inhibit the construction of a major highway? Have we lost perspective when we allow plants or animals or land formations to become more important than the rights of individuals to utilize private property as they wish? Individual rights and economic growth should not be sacrificed to the environment.

If we must preserve and protect plant and animal species and land formations, let us do so with a plan mutually beneficial to all parties. Let economic growth occur, protect individual property rights, and find compatible solutions to preserve our resources.

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- Constitution of Indiana, *Indiana Code*, Vol. 1, pp. 1-31 (Indianapolis, 1988).
- Constitution of the United States.
- Declaration of Independence.
- Durfee, S. Donald. *Indiana Department of Natural Resources, Its Purpose for Today, Its Goals for Tomorrow*. Indianapolis: Department of Natural Resources, 1972.
- Glendon, Mary Ann. *Rights Talk, The Impoverishment of Political Discourse*. New York: Free Press, 1991.
- *Indiana Code* 14-3.
- *Indiana Nature Preserves*, pamphlet reprinted from *Outdoor Indiana*.
- *Nature Conservancy* (newsletter). Spring 1988.

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## Some Relevant Court Cases

- *Town of Beverly Shores v. Bagnall*, 590 N.E. 2d 1059 (Ind. 1992).

A town's board of zoning appeals denied a requested variance, which would have permitted construction of a residence on the Indiana dunes. The trial court held that this denial was an unconstitutional taking. The Indiana Supreme Court held that the denial was proper on grounds related to saving the dunes and reversed the decision of the lower court.

- *Department of Natural Resources v. Indiana Coal Council*, 542 N.E. 2d 1000 (Ind. 1989).

The Indiana Supreme Court upheld the Indiana statute which empowered the director of the DNR to declare an area (including coal rich areas) unsuitable for surface mining if the coal mining operation affected "fragile and historical lands in which the operation could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems." The land at issue was a farm which sat atop three rich coal seams. A 6.57 acre portion, known as the Beehunter Site, was an archaeologically significant area. The court determined that the statute was constitutional since it required only that the landowner delay strip mining until archaeological information at the site had been recovered.

- *Whitacre v. State of Indiana and the Indiana Department of Natural Resources*, No. 15A05-9204-CV-128.

The Whitacres, amateur archaeologists, excavated a Hopewell Indian site, c.150 A.D., with permission of the property owner. In 1987, they purchased the farm and continued excavation. In July, 1989, after hearing that a new law had been passed, Whitacre inquired as to the necessity of a permit for conducting investigations on his own property. He was informed that he would need a permit. Whitacre disagreed. The court held that *Indiana Code* 14-3-3.4 was applicable to private property and not just property owned or leased by the State of Indiana. The opinion noted that it has been stated that protecting our national and state heritage through the preservation of archaeological sites is included in the broad spectrum of legitimate interests of government.

- *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

Lucas was denied the right to build on two seaside lots after the state restricted coastal development. He sued for the nearly \$1 million he had paid for the lots since the regulation deprived him of all reasonable economic use of his property. The state trial court found for Lucas; the state supreme court reversed the decision. The U.S. Supreme Court remanded the case to the state supreme court to determine whether Lucas' situation really was an exception to the Fifth Amendment right to compensation.

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## What Do You Think?

1. How has the power of eminent domain been used in your area by the local, state, and national government?
2. What factors should be considered in determining “just compensation” for private property?
3. What are area businesses and industries doing to promote preservation and conservation? What is the difference between conservation and preservation?
4. What kinds of actions have citizens and environmental groups taken in your area for conservation and preservation?
5. Are there sheltered areas in your community which have been designated for protection of species? Consult your area conservation officer to discuss what efforts you can undertake for preservation and conservation.

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## Continuing to Explore

1. Contrast the beliefs of James Madison and Thomas Jefferson on the subject of private property rights.
2. When is an environmental impact study required? How is one conducted? How are the results utilized?
3. Are there circumstances when the rights of the individual outweigh government’s power to use eminent domain proceedings for the public good? What might be extenuating circumstances in making such a determination?
4. What were some of the earliest restrictions on property use in the United States?

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## For More Information

- Kettleborough, Charles. *Constitution Making in Indiana*, Vol. 1. Indianapolis: Indiana Historical Bureau, reprint, 1971.
- Meltzer, Milton. *The Bill of Rights—How We Got It and What It Means*. New York: Thomas Y. Crowell, 1990.
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